UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRYAN T. NELSON	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 99-237-B-H
	)	
WAYNE KLINE and MATTHEW CUNNINGHAM	)	
	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

In this action brought pursuant to 42 U.S.C. § 1983, Plaintiff alleges that Defendants, Wayne Kline and Matthew Cunningham, violated his Fourth Amendment rights. Presently referred to me for recommended decision are Defendants' Motions for Summary Judgment (Docket Nos. 10 and 12). For reasons outlined below, I recommend that the Court GRANT Defendants Kline's and Cunningham's Motions for Summary Judgment.

Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views

the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Facts

At 11:36 p.m., on September 17, 1999, the Somerset County Sheriff's Department requested Officer Cunningham to assist Deputy Wayne Kline, of the Madison Police Department, to locate a pick-up truck that was allegedly driving recklessly on Ward Hill Road in Norridgewock. The dispatcher described the vehicle as a full-size truck with running lights and a loud exhaust. (Def. Kline's Statement of Material Facts ¶ 7.) Cunningham contacted Kline via radio. Kline told Cunningham that he would travel through Ward Hill and continue south on the Ward Hill Road. Officer Cunningham placed his patrol vehicle at the intersection of Preble Avenue and Walker Road. (Pl's Statement of Material Facts ¶¶ 1-3.)

While Cunningham remained stationed in his patrol vehicle, Kline arrived at the intersection and patrolled the area around it. (Pl's Statement of Material Facts ¶ 4.) Kline spotted a vehicle on Beech Hill Road that matched the description of the vehicle he received from the dispatcher. (Def. Kline's Statement of Material Facts ¶ 7.) Cunningham overheard Kline advise the radio dispatcher that he located a pick-up truck on Beech Hill Road that fit the description of the pick-up truck. Kline

stopped and approached the truck. When Kline stopped the truck he became suspicious because instead of pulling on to the right side of the road, the truck pulled over on to the left side. (Def. Kline's Responsive Statement of Material Facts ¶ 12.)

Inside the truck were Plaintiff and his brother. Kline told Plaintiff about the reported incident and asked if he was involved in it. Plaintiff told him he was not involved but did see a red pick-up truck driving recklessly where the incident was reported and that he last saw it head south on Ward Hill Road. Kline then noticed an odor of alcohol coming from the cab and asked Plaintiff if he had been drinking. Plaintiff told him he had been drinking. Kline did not have enough information to determine whether Plaintiff was intoxicated so he offered to give him a ride home. Plaintiff declined Kline's offer so Kline advised him to go home and that he would follow them to make sure they got there.[1] (Pl's Statement of Material Facts ¶¶ 9-14; Def. Kline's Statement of Material Facts ¶¶ 8-15.) It is unclear how long Kline followed Nelson.

After leaving the scene Kline called Cunningham on the radio and told him that he knew Plaintiff and his brother. Kline said they described a red truck driving recklessly and last saw it headed south on Ward Hill Road. Kline then told Cunningham that Plaintiff left the scene of the stop and headed towards Madison. (Pl's Statement of Material Facts ¶ 17.) Cunningham recalls Kline telling him that he may want to stop the pick-up if he saw it because the truck's exhaust was loud. Kline also told him that he might want to check the driver for OUI because he smelled alcohol when he stopped him.[2] (Details of Investigation ¶ 5.) Cunningham, who was headed in the opposite

[1] Kline admits that he told Nelson to go home but states that he did not follow him or offer to follow him home. Def. Kline's Responsive Statement of Material Facts ¶ 10.

[2] Kline states that he does not recall telling Cunningham that the exhaust was loud or that he should check the driver for OUI.

direction from where Plaintiff was traveling, turned around and headed towards Ward Hill Road. (Id.)

Cunningham passed Plaintiff's truck and noticed that he had a loud exhaust. Although Cunningham did not observe any erratic operation of the vehicle, he thought it was unusual that the truck slowed down when they passed each other and that while he turned his cruiser around the truck pulled over on to the left side of the road. (Id. ¶ 6.) Cunningham knew that the truck he stopped was the same vehicle Kline had stopped three minutes earlier. Although Kline provided Cunningham with information, Cunningham stopped the Plaintiff's truck based on the following:

> Another police officer advises me that he smells alcohol on the operator of a motor vehicle that fits the description of one operating recklessly on the Ward Hill Road, *I subsequently make the observations of a loud exhaust* after being advised of a loud exhaust, erratic operation, and the traffic from Deputy Kline himself.
>
> And at that point I had been advised that the subject may be intoxicated. As a result I have little choice other than to investigate the allegations made by another police officer. I've got to take what he tells me at face value.

(Cunningham dep. at p. 72.)

During the stop of Plaintiff's vehicle, Cunningham contacted Kline to confirm the registration number of the vehicle was the same as the vehicle Kline had stopped earlier, and to advise Kline of his position. Kline later arrived at the scene to serve as "back up". (Pl's Statement of Material Facts ¶ 24.) Cunningham approached Plaintiff in the vehicle and asked him if he felt all right to drive to which Plaintiff responded "yes". (Id. ¶ 26.) Cunningham did not observe any containers in the cab but did smell alcohol. Cunningham asked Plaintiff to step out from the vehicle and perform some field sobriety tests which Cunningham determined Plaintiff failed. Cunningham asked Plaintiff to accompany him to the station so that he could conduct a breathalyzer test on Plaintiff. Based on the

results of breathalyzer test, Cunningham cited Plaintiff for OUI. (Def. Cunningham's Statement of Material Facts ¶ 33.) Maine District Judge Clapp later held a motion to suppress hearing in the OUI proceeding and granted Plaintiff's motion to suppress. Judge Clapp, in part, found that:

> The actions of Officer Cunningham and Deputy Kline were simply a ruse to justify the Madison Police Department's second stop of the Defendant's vehicle - presumably because Deputy Kline disbelieved the Defendant's earlier claims that his truck was not the one involved in the reported mischief. All Officer Cunningham knew immediately before his stop is that the Defendant's truck was still suspected of being the one involved in the earlier report despite the operator's denials; the operator had been drinking, but did not show signs of impairment; and that he should listen for loud exhaust when the truck passed by. This stop was without legal or constitutional foundation.

Order, February 8, 1999 at p.2.

It is undisputed that a mechanic, Ross Frazier, repaired Plaintiff's exhaust system approximately ten days before this incident. About a week or so after conducting the repair, Frazier received a call from Plaintiff. Plaintiff told him that his truck was getting loud and he wanted to know why. Frazier told him that perhaps a bolt had broken off his manifold. While Frazier waited on the phone Plaintiff checked his truck and returned and told Frazier that there was a hole where the bolt should be. Frazier told Plaintiff to bring in the truck but does not recall if he ever did so. (Def. Cunningham's Statement of Material Facts ¶¶ 11-14.)

Analysis

Before addressing whether a Fourth Amendment violation occurred, I must first address how much weight, if any, to give to Judge Clapp's decision to grant Plaintiff's motion to suppress in the criminal OUI proceeding. Both parties agree that Judge Clapp's decision does not collaterally estop Defendants from challenging Plaintiff's allegations in this action. Both parties disagree however, on whether I may consider the state order as relevant evidence regarding the reasonableness of the successive stops.

A. State Judge's Order

Plaintiff cites three cases that he contends permit me to consider the state judge's suppression order as evidence of the reasonableness of the stops. Two of the cases are easily distinguishable from this case. In *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), the Court held that, although an award in an arbitration proceeding brought pursuant to a collective bargaining agreement may be considered as evidence, the award does not preclude a later suit in federal court. *Id.* at 288-89, 292. n. 13. In *Olson v. Largo-Springhill Ltd. Partnership*, 919 F. Supp.847, 852 (D. Md. 1995) the court found that an administrative decision need only be given weight that the factfinder determines it to be worth.[3]

The glaring difference between those two cases and this one is that the parties in the administrative and arbitration proceedings were *the same parties* before the Court. By contrast, the parties in the suppression hearing were not Plaintiff and Defendants, but the Plaintiff and the State of Maine. It would be patently unfair to use the state judge's order as evidence that Defendants

[3] The third case, *Diamondstone v. Macaluso*, 148 F.3d 113, 125 (2nd Cir. 1998), found it "noteworthy" that a state traffic court found a failure of proof to sustain the citation.

committed a constitutional violation that amounts to personal liability when they did not have counsel to represent their *own* interests at the hearing.[4]

B. Liability under Section 1983

A plaintiff may make a claim pursuant to section 1983 by demonstrating "First, that the defendants acted under color of state law; and second, that the defendants' conduct worked a denial of rights secured by the Constitution or by federal law." *Rodriguez-Cirilo v.Garcia*, 115 F.3d 50, 52 (1st Cir. 1997). To meet the second element the plaintiff "must show that the defendants' conduct was the cause in fact of the alleged deprivation." *Id.* Here, Plaintiff alleges that Defendants violated his Fourth Amendment rights when Cunningham, based on information provided to him by Kline, pulled him over three minutes after Kline's initial stop.

C. Fourth Amendment

The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons to be seized.

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[4] The Court of Appeals has recently considered this issue in the context of a search of an individual's fenced backyard, and reached the same conclusion. *Bilida v. MacLeod*, No. 99-1263.01A, 2000 WL 528014 at *2 (1st Cir. May 5, 2000) ("Although no Rhode Island case in point has been cited to us, most precedent indicates that individual state officials are not bound, in their individual capacities, by determinations adverse to the state in prior criminal cases. *E.g.*, *Kraushaar v. Flanigan*, 45 F.3d 1040, 1050 (7th Cir. 1995); *see generally* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* §§ 4458, at 508 (1981). The reason is that the interests and incentives of the individual police or officials are not identical to those of the state, and the officers normally have little control over the conduct of a criminal proceeding.")

U.S. Const. amend. IV. The Supreme Court has extended the protection afforded under the Fourth Amendment to when a law enforcement officer stops a vehicle. *United States v. Hensley*, 469 U.S. 221, 229 (1985). Police, however, are constitutionally permitted in certain instances to detain an individual without a warrant or probable cause when they have a reasonable suspicion that the occupants have been, or are about to be, involved in unlawful activity. *United States v. Cortez*, 449 U.S. 411, 418 (1981). In the context of traffic stops, I must examine first, whether the second stop was justified at its inception, and second, whether the police action was reasonable in scope which justified the stop in the first place. *United States v. Phillips*, No. 96-10006-01, 1996 WL 432377 at *3 (D. Kan. July 12, 1996) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975)).

Plaintiff does not challenge the initial stop by Deputy Kline nor does he challenge whether Cunningham's action was reasonable in scope once he stopped his truck. Instead Plaintiff argues that the second stop coordinated by Deputy Kline and Officer Cunningham was not justified at its inception. Plaintiff points out even though Kline had stopped Plaintiff and investigated (1) the reckless driving report; (2) the loud exhaust and (3) the condition of Plaintiff, he decided to allow Plaintiff to proceed. Having made that decision, the stop by Officer Cunningham three minutes later was objectively unreasonable.

i. Deputy Kline

Although Kline did not personally stop Plaintiff a second time, Plaintiff asserts that Kline is liable because he coordinated the second stop by providing Cunningham with information about Plaintiff and suggesting to Cunningham that he may want to stop Plaintiff's vehicle. As stated earlier, a plaintiff may pursue a claim pursuant to section 1983 if the plaintiff demonstrates that the

defendant's conduct was the cause in fact of the alleged constitutional deprivation. *Rodriguez-Cirilo*, 115 F.3d at 52.

Even if I assume that a question of fact exists regarding whether Cunningham's stop of Plaintiff's vehicle violated the Fourth Amendment, the record does not support imposing liability on Deputy Kline. To put it simply, the record evidence does not causally link Kline to the alleged constitutional deprivation. Cunningham and Kline concur that while Kline told Cunningham that Plaintiff might be OUI and that Plaintiff's exhaust was loud, there is no suggestion that Kline specifically requested that Cunningham stop Plaintiff. In fact, while Cunningham's testimony suggests that the information provided by Kline influenced his decision to stop Plaintiff, Cunningham stated that *it was his decision* to stop Plaintiff. Based on the record evidence, Plaintiff's 1983 claim against Kline falls short.

ii. Officer Cunningham

Plaintiff next argues that the second stop of his vehicle by Officer Cunningham was objectively unreasonable in light of Kline's previous stop. Cunningham counters that his testimony, that he stopped Plaintiff's vehicle when he passed it and heard the loud exhaust, provides a sufficient specific and articulable fact to justify stopping the vehicle.

A traffic stop is justified at its inception under the Fourth Amendment if "the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring." *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995). When reviewing whether a Fourth Amendment violation occurred, the

officer's "subjective motives for stopping the vehicle" are irrelevant. *Id.* The sole inquiry is whether the officer had an articulable suspicion that a traffic violation occurred or is occurring.[5] *Id.*

The issue here then is whether Officer Cunningham had an articulable suspicion that a traffic violation occurred or was occurring when he stopped Plaintiff. The undisputed evidence is that he did. Cunningham testified that when he passed Plaintiff's truck he noticed a loud exhaust and decided to pull him over. *See* 29-A M.R.S.A. § 1912. Plaintiff has offered no evidence to dispute Cunningham's statement that the exhaust was loud. Further, the undisputed fact that Plaintiff called a mechanic around the time of the stop because he was concerned that his truck was getting loud lends further support to Cunningham's proffered reason for the stop. Based on the evidence in the record, I am satisfied that the second stop of Plaintiff's vehicle was justified at its inception and therefore did not violate Plaintiff's Fourth Amendment rights.

Conclusion

For reasons stated above I recommend that the Court GRANT Defendants Kline's and Cunningham's motions for summary judgment.

[5] In *Whren v. United States*, 517 U.S. 806 (1996), the Court held that the temporary detention of a motorist was not a violation of the Fourth Amendment because the officer had probable cause to believe that a violation occurred.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Margaret J. Kravchuk
United States Magistrate Judge

Dated on May 16, 2000.

TRLIST STNDRD

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-237

NELSON v. KLINE, et al Filed: 10/08/99
Assigned to: JUDGE D. BROCK HORNBY Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

BRYAN T NELSON
plaintiff

BRETT D. BABER
947-4501
[COR LD NTC]
AJAZ S. FIAZUDDIN, ESQ.
[COR]
RUDMAN & WINCHELL
84 HARLOW STREET
P.O. BOX 1401
BANGOR, ME 04401
(207) 947-4501

v.

WAYNE KLINE defendant	JOHN J. WALL, III, Esq. [COR LD NTC] MONAGHAN, LEAHY, HOCHADEL & LIBBY P. O. BOX 7046 DTS PORTLAND, ME 04112-7046 774-3906
MATTHEW CUNNINGHAM defendant	MICHAEL E. SAUCIER, ESQ. [COR LD NTC] THOMPSON & BOWIE 3 CANAL PLAZA P.O. BOX 4630 PORTLAND, ME 04112 774-2500
KEITH BIGGER defendant [term 04/17/00]	MICHAEL E. SAUCIER, ESQ. [term 04/17/00] (See above) [COR LD NTC]